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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 DARREN WEBB, ) NO. CV 12-4793-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 MICHAEL J. ASTRUE, COMMISSIONER ) AND ORDER OF REMAND  
18 OF SOCIAL SECURITY, )  
19 )  
20 Defendant. )  
21 )  
22 )  
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18  
19 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
20 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
21 judgment are denied and this matter is remanded for further  
22 administrative action consistent with this Opinion.  
23

24 PROCEEDINGS  
25

26 Plaintiff filed a complaint on June 6, 2012, seeking review of  
27 the Commissioner's denial of disability benefits. The parties filed a  
28 consent to proceed before a United States Magistrate Judge on July 16,

1 2012. Plaintiff filed a motion for summary judgment on November 6,  
2 2012. Defendant filed a cross-motion for summary judgment on  
3 December 4, 2012. The Court has taken the motions under submission  
4 without oral argument. See L.R. 7-15; "Order," filed June 7, 2012.  
5

6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**  
7

8 Anticipating his release from prison, Plaintiff applied for  
9 Supplemental Security Income ("SSI") on November 26, 2008  
10 (Administrative Record ("A.R.") 182-87, 216-17, 222). Plaintiff  
11 asserts disability since January 1, 2004, based on alleged  
12 schizophrenia and severe depression (id.).  
13

14 An Administrative Law Judge ("ALJ") determined that Plaintiff  
15 suffers from severe "schizoaffective disorder vs. bipolar disorder,"  
16 with a history of seizure disorders, but that these disorders do not  
17 meet or equal a listed impairment (A.R. 12-13, 16 (adopting in part  
18 State Agency review physician opinion at A.R. 397-410, and in part the  
19 diagnoses at A.R. 286, 289-90, 298, 303, 320, 323, 338, 342, 355-61,  
20 363, 379, 385, 389, 454, 461, 480, 486-87, 496, 508, 624, 636, 674)).  
21 The ALJ found that Plaintiff retains the residual functional capacity  
22 to perform medium work limited to: (1) work that does not require  
23 climbing ladders, ropes or scaffolds, or any exposure to hazardous  
24 machinery, unprotected heights, or other high risk, hazardous or  
25 unsafe conditions (seizure precautions) (A.R. 13 (adopting State  
26 agency review physician's physical residual functional capacity  
27 assessment at A.R. 411-18)); and (2) "simple, routine, and repetitive  
28 tasks performed in a low stress work environment, which is defined as

1 work that does not require changes in work setting or any unusual,  
2 very fast pace or production rate requirements," requiring "no more  
3 than occasional interaction with the public and co-workers" (A.R.  
4 13).<sup>1</sup> The ALJ found that, with this capacity, Plaintiff could perform  
5 jobs as a hand packager, house worker, or night cleaner (industrial),  
6 and therefore is not disabled (A.R. 12, 16, 20 (adopting vocational  
7 expert testimony at A.R. 67-68)).

8  
9 Plaintiff sought review from the Appeals Council, submitting a  
10 legal brief, a letter from Plaintiff's drug and alcohol counselor, and  
11 some additional medical records (A.R. 5; see also A.R. 276-83 (legal  
12 brief), 682-698 (letter and additional medical records)). The Appeals  
13 Council considered these additional materials, but denied review (A.R.  
14 1-5).

#### 15 16 STANDARD OF REVIEW

17  
18 Under 42 U.S.C. section 405(g), this Court reviews the  
19 Administration's decision to determine if: (1) the Administration's  
20 findings are supported by substantial evidence; and (2) the  
21 Administration used proper legal standards. See Carmickle v.  
22 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
23 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such  
24 relevant evidence as a reasonable mind might accept as adequate to  
25 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
26 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454

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27  
28 <sup>1</sup> As discussed below, it is unclear how the ALJ arrived  
at these non-exertional limitations.

1 F.3d 1063, 1067 (9th Cir. 2006).

2  
3 Where, as here, the Appeals Council considered additional  
4 material but denied review, the additional material becomes part of  
5 the Administrative Record for purposes of the Court's analysis. See  
6 Brewes v. Commissioner, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen  
7 the Appeals Council considers new evidence in deciding whether to  
8 review a decision of the ALJ, that evidence becomes part of the  
9 administrative record, which the district court must consider when  
10 reviewing the Commissioner's final decision for substantial  
11 evidence."; expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452  
12 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1232 (2011)  
13 (courts may consider evidence presented for the first time to the  
14 Appeals Council "to determine whether, in light of the record as a  
15 whole, the ALJ's decision was supported by substantial evidence and  
16 was free of legal error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th  
17 Cir. 1993) ("the Appeals Council considered this information and it  
18 became part of the record we are required to review as a whole"); see  
19 generally 20 C.F.R. §§ 404.970(b), 416.1470(b).

## 20 21 DISCUSSION

22  
23 After reviewing the entire record, including the additional  
24 evidence provided for the first time to the Appeals Council, the Court  
25 has concluded that the Administration's decision is not supported by  
26 substantial evidence. Remand is appropriate under sentence four of 42  
27 U.S.C. section 405(g).

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1       **A.     The Record Before the ALJ**

2

3       Plaintiff reported a long history of mental health problems,  
 4 including suicide attempts when Plaintiff was seven and eleven years  
 5 old, as well as addiction. See A.R. 259-60, 284, 437, 440, 651  
 6 (detailing same). Plaintiff has been incarcerated at least six times,  
 7 with his first arrest at age 22 (A.R. 298, 437, 636, 651, 672).

8

9       Consultative psychiatrist, Dr. Ernest A. Bagner III, examined  
 10 Plaintiff and prepared a Complete Psychiatric Evaluation dated  
 11 March 6, 2009 (A.R. 392-95). Dr. Bagner reviewed a psychiatric note  
 12 from Dr. Fisher dated July 13, 2007, but no other medical records  
 13 (A.R. 393; see also A.R. 297-99, 307 (available records from Dr.  
 14 Fisher for this date)).<sup>2</sup> Plaintiff reported to Dr. Bagner that he  
 15 suffers from schizophrenia and depressive disorders, and has  
 16 difficulty dealing with people, mood swings, depression, nervousness,  
 17 feelings of helplessness and hopelessness, low motivation, auditory

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18

19       <sup>2</sup> Dr. Fisher, a psychologist, diagnosed Plaintiff with  
 20 "Bipolar II - Depressed," other substance abuse, alcohol abuse,  
 21 and a seizure disorder, and assigned Plaintiff a GAF score of 57  
 22 (A.R. 298-99). Clinicians use the GAF scale to report an  
 23 individual's overall psychological functioning. The scale does  
 24 not evaluate impairments caused by physical or environmental  
 25 factors. See American Psychiatric Association, Diagnostic and  
 26 Statistical Manual of Mental Disorders ("DSM-IV-TR") 34 (4th Ed.  
2000 (Text Revision)). A GAF score of 51-60 indicates "moderate  
 symptoms (e.g., flat affect and circumstantial speech, occasional  
 panic attacks), or moderate difficulty in social, occupational,  
 or school functioning (e.g., few friends, conflicts with peers or  
 co-workers)." Id.

27       Plaintiff was incarcerated at the time (A.R. 299). Dr.  
 28 Fisher did not offer any further opinion concerning Plaintiff's  
 functional limitations.

1 and visual hallucinations, and sleep disturbance (A.R. 392-93).  
2 Plaintiff also reported a history of suicidal ideations, one  
3 psychiatric hospitalization, and alcohol dependency with his last use  
4 in November 2006 (id.). Plaintiff was taking Seroquel and Prozac  
5 (A.R. 393).

6  
7 Dr. Bagner diagnosed Plaintiff with a mood disorder, not  
8 otherwise specified, and alcohol abuse in remission, and indicated a  
9 need to rule out anti-social personality disorder (A.R. 394).  
10 Consistent with Dr. Fisher's evaluation, Dr. Bagner assigned Plaintiff  
11 a GAF of 60 and stated that Plaintiff has had "minimal improvement"  
12 with psychiatric medications (A.R. 394). Dr. Bagner opined:

13  
14 The patient would have zero to mild limitations interacting  
15 with supervisors, peers and the public. He reports zero to  
16 mild limitations maintaining concentration and attention and  
17 completing simple tasks. He would have mild to moderate  
18 limitations handling normal stresses at work and completing  
19 complex tasks. He would have moderate limitations  
20 completing a normal workweek without interruption.

21  
22 (A.R. 395 (emphasis added)).  
23

24 State agency physician Dr. K. Gregg completed a Psychiatric  
25 Review Technique form and case analysis for Plaintiff dated March 17,  
26 2009 (A.R. 397-410). Dr. Gregg reviewed Dr. Bagner's assessments and  
27 a summary of Plaintiff's available medical records. See A.R. 408-10

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(case analysis summarizing same).<sup>3</sup> Dr. Gregg opined that Plaintiff's impairments are "not severe," and that the evidence does not satisfy the diagnostic criteria for affective disorders (A.R. 397, 400, 406). Dr. Gregg believed that Plaintiff would have only mild difficulties in maintaining social functioning and maintaining concentration, persistence, or pace (A.R. 405). Dr. Gregg indicated that Plaintiff would have no limitations in activities of daily living and no

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<sup>3</sup> Available medical records were somewhat scattered. See A.R. 284-389 (records). Treatment notes show that Plaintiff reported auditory hallucinations and paranoia in December 2003 (A.R. 286, 296, 337), January 2004 (A.R. 319, 323-24), February 2004 (A.R. 334), June 2005 (A.R. 311, 329-30, 362), August 2005 (A.R. 359, 363), November 2005 (A.R. 356-57), January 2006 (A.R. 354-55), March 2007 (A.R. 303, 309, 350, 352, 388-89), May 2007 (A.R. 348-49; but see A.R. 346 (treatment note from May 2007 indicating Plaintiff denied hallucinations)), June 2007 (A.R. 345), July 2007 (A.R. 298, 385), September 2007 (A.R. 343), October 2007 (A.R. 341-42), November 2007 (A.R. 340), December 2007 (A.R. 339, 380), January 2008 (A.R. 378), February 2008 (A.R. 383), March 2008 (A.R. 377; but see A.R. 496 (later submitted March 2008 note indicating Plaintiff reported no symptoms and was stable and wanted to get off his psychiatric medications)), June 2008 (A.R. 375), August 2008 (A.R. 374), September 2008 (A.R. 373; but see A.R. 474 (later submitted September 2008 note indicating Plaintiff was "completely asymptomatic" and reapplying for SSI)), October 2008 (A.R. 371), and December 2008 (A.R. 367). Treatment notes from 2004 also show that Plaintiff complained of auditory hallucinations, and Plaintiff claimed he wanted psychiatric medication to help him sleep so his time in incarceration would go by faster. See A.R. 313-18 (notes). Plaintiff reportedly denied having auditory hallucinations in April 2007 (A.R. 347). Treatment notes from July and August 2007 report that Plaintiff had no psychotic symptoms on his current medications (A.R. 344).

The most recent available medical record for Plaintiff at the time of the State agency physician review was a December 16, 2008 treatment note reporting that Plaintiff was soon to be released from custody, and diagnosing Plaintiff with "bipolar I D/O [disorder], depressed [with] pf [psychotic features]" (A.R. 367). Plaintiff then complained of auditory hallucinations and depression related to being away from his family (A.R. 367).

1 repeated episodes of decompensation of extended duration (A.R. 405).  
2 Dr. Gregg stated that Plaintiff had "credible mood problems, but mild"  
3 (A.R. 407).  
4

5 State agency physician Dr. K. Wahl prepared a Physical Residual  
6 Functional Capacity Assessment form for Plaintiff dated March 29, 2009  
7 (A.R. 411-18). Dr. Wahl stated that Plaintiff has a "history of  
8 seizure" that is "now controlled" (A.R. 411). Dr. Wahl opined that  
9 Plaintiff should avoid even moderate exposure to hazards and advised  
10 that Plaintiff should have seizure precautions (i.e., no unprotected  
11 heights, open bodies of water, open electrical circuits, driving or  
12 heavy equipment) (A.R. 414). Dr. Wahl found no other limitations  
13 (A.R. 412-14; see also A.R. 417-18).  
14

15 After the above-summarized medical evaluations and prior to the  
16 ALJ's adverse decision, Plaintiff's counsel submitted numerous  
17 additional medical records to the ALJ. See A.R. 16-19 (ALJ  
18 summarizing record); see also A.R. 431-674 (additional records  
19 covering the time period from January 2004 through December 2010).  
20 Like the previously submitted records, these records reflect that  
21 Plaintiff has complained of auditory hallucinations. See, e.g., A.R.  
22 436, 438, 454, 461, 470, 478, 489, 500, 507, 573, 575-76, 578, 580,  
23 585, 595, 597-98, 616, 619, 621-22, 624-25, 626, 634, 636, 645, 647,  
24 651, 652, 657, 663, 666, 670 (noting complaints). Plaintiff claimed  
25 that he has heard "bad voices" every day since he was 14 years old  
26 (A.R. 670).  
27

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28 ///



1 In September 2004, Plaintiff reported that his auditory  
2 hallucinations made it difficult for him to hold a job due to  
3 concentration issues. See A.R. 436 (September 2004 record). An  
4 August 2004 psychological assessment prepared by Plaintiff's treating  
5 psychologist stated that due to Plaintiff's hallucinations and  
6 paranoia that had not been stabilized with medication, Plaintiff would  
7 not be able to cope effectively with the demands of work and other  
8 employees, and therefore Plaintiff could not work. See A.R. 438  
9 (evaluation); see also A.R. 652 (January 2005 assessment by same  
10 psychologist reaching same conclusion); but see A.R. 440 (August 2004  
11 note indicating that Plaintiff reported working 12 hours)). Plaintiff  
12 then was seeking social security benefits. See A.R. 450.

13  
14 Plaintiff was released from incarceration sometime in or around  
15 March 2006 (A.R. 644). An April 2006 treatment note indicates that  
16 Plaintiff was approved for SSI benefits (A.R. 641; see also A.R. 650  
17 (January 2005 note indicating that Plaintiff had been denied SSI  
18 benefits four times previously)).

19  
20 Plaintiff later returned to custody. A pre-release follow up  
21 from November 2008, indicates that Plaintiff was expected to be  
22 paroled in December 2008 and had concerns about whether he would  
23 receive social security benefits, but described Plaintiff as stable  
24 (A.R. 460). A treatment plan from January 2009 prepared by a social  
25 worker states that, due to Plaintiff's mental illness, he is not  
26 capable of living independently or maintaining employment (A.R. 624-  
27 25). The social worker stated that SSI would "further stabilize"  
28 Plaintiff and "further his access to treatment" (A.R. 625).

1 In May 2010, Plaintiff reported he was unable to function due to  
2 distraction from hearing voices and isolation due to his paranoia  
3 (A.R. 670). Plaintiff, however, could perform his own basic  
4 activities of daily living (A.R. 670). Plaintiff was diagnosed with  
5 schizoaffective disorder depressive type, post traumatic stress  
6 disorder, alcohol dependence in full remission, and with a need to  
7 rule out mood disorder not otherwise specified (A.R. 674). Plaintiff  
8 was assigned a GAF of 52 (A.R. 674).

9  
10 **B. Additional Evidence Submitted to the Appeals Council**  
11 **Following the ALJ's Adverse Decision**  
12

13 Additional evidence submitted to the Appeals Council included a  
14 December 2010 follow up medication note indicating that Plaintiff had  
15 a history of "voices in the head," but was stable with no reported  
16 auditory hallucinations at that time (A.R. 690). Plaintiff was  
17 hospitalized in March 2011 for depression, anxiety, panic, medication  
18 "abuse," and suicidal urges (A.R. 695). Plaintiff then was off his  
19 medications (A.R. 695). Plaintiff's resumed his medications and was  
20 released three days later, stable with no reported hallucinations  
21 (A.R. 695-97). Plaintiff's treating doctor diagnosed Plaintiff with  
22 schizophrenia paranoid type and assigned a GAF of 40 at the time of  
23 his release (A.R. 695, 698).<sup>4</sup>

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24  
25 <sup>4</sup> A GAF score of 31-40 indicates "some impairment in  
26 reality testing or communication (e.g., speech is at times  
27 illogical, obscure, or irrelevant) or major impairment in several  
28 areas such as work or school, family relations, judgment,  
thinking, or mood (e.g., depressed man avoids friends, neglects  
family, and is unable to work. . .)." DSM-IV-TR at 34.

1       **C.    Analysis**

2

3       In determining that Plaintiff retains a residual functional

4 capacity that permits Plaintiff to work, the ALJ adopted the physical

5 limitations and abilities assessed by State Agency review physician

6 Dr. Wahl. See A.R. 17-18. The ALJ determined Plaintiff's specific

7 non-exertional (mental) limitations to be limitations to simple,

8 routine, repetitive tasks in a low stress environment, which does not

9 require changes in work setting or any unusual or fast pace or

10 production rate requirements, and no more than occasional interaction

11 with the public and co-workers (see A.R. 13). In reaching this

12 determination, the ALJ claimed to have given "significant weight" to

13 Dr. Bagner's opinions and also claimed to have adopted "slightly more

14 restrictive limitations" than Dr. Bagner found to exist (A.R. 18).

15

16       The ALJ did not expressly acknowledge Dr. Bagner's opinion that

17 Plaintiff would have "moderate limitations completing a normal

18 workweek without interruption." Compare A.R. 17 (ALJ's summary of Dr.

19 Bagner's assessment) with A.R. 395 (Dr. Bagner's assessment). Thus,

20 it is unclear whether the ALJ considered this portion of Dr. Bagner's

21 opinion in determining Plaintiff's residual functional capacity. The

22 ALJ's failure to acknowledge, and possible failure to consider, this

23 portion of Dr. Bagner's opinion may have been material to the

24 disability determination. The vocational expert testified that, if a

25 person with the residual functional capacity the ALJ found to exist

26 were to miss more than two days of work per month, it would preclude

27 employment. See A.R. 68-69 (vocational expert testimony).

28    ///

1 Furthermore, the ALJ did not have any expert opinion translating  
2 Dr. Bagner's assessment into specific non-exertional functional  
3 limitations. Dr. Bagner himself did not translate his assessment into  
4 a specific residual functional capacity. See A.R. 395 (Dr. Bagner's  
5 opinion). The State agency review physician who considered Dr.  
6 Bagner's assessment did not translate the assessment into a specific  
7 residual functional capacity. See A.R. 397-410 (State agency review  
8 assessment). There is no Mental Residual Functional Capacity  
9 Assessment form in the record. And, finally, the ALJ did not seek the  
10 services of a medical expert to translate Dr. Bagner's opinion into  
11 specific functional limitations. Thus, one is left to speculate  
12 regarding the issue of what "moderate limitations completing a normal  
13 workweek without interruption" might mean in terms of, for example,  
14 possible absenteeism.<sup>5</sup>

15  
16 Absent expert assistance, the ALJ could not competently translate  
17 Dr. Bagner's opinions into a residual functional capacity assessment.<sup>6</sup>  
18 It is well-settled that an ALJ may not render his or her own medical  
19 opinion or substitute his or her own diagnosis for that of a  
20 claimant's physician. See Tackett v. Apfel, 180 F.3d 1094, 1102-03

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21  
22 <sup>5</sup> To the extent the ALJ intended to suggest that  
23 "moderate" limitations are never consistent with a disabling  
24 condition (A.R. 18), the suggestion must be rejected. See, e.g.,  
25 Andrews v. Shalala, 53 F.3d 1035, 1044 (9th Cir. 1995) (failure  
to consider "moderate limitations" on the non-exertional  
functioning of a disability claimant required remand).

26 <sup>6</sup> Compare Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1174  
27 (9th Cir. 2008) (ALJ could translate claimant's condition  
28 involving mental limitations into concrete residual functional  
capacity where there existed a basis in the medical record for  
doing so (i.e., supporting medical opinions)).

(9th Cir. 1999) (ALJ erred in rejecting physicians' opinions and finding greater residual functional capacity based on claimant's testimony concerning a road trip; there was no medical evidence to support the ALJ's determination); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden from making his own medical assessment beyond that demonstrated by the record); Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) (an "ALJ cannot arbitrarily substitute his own judgment for competent medical opinion") (internal quotation marks and citation omitted); Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996) ("ALJs must not succumb to the temptation to play doctor and make their own independent medical findings"). In this case, before the ALJ determined that a particular residual functional capacity assessment would account for Plaintiff's medical conditions, the ALJ should have called on an expert to provide competent evidence with respect to such issues.

Because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors,<sup>7</sup> remand is

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<sup>7</sup> There are outstanding issues that must be resolved before a proper disability determination can be made in the present case. For this reason, the Ninth Circuit's decision in Harman v. Apfel, 211 F.3d 1172 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) ("Harman") also does not compel a reversal for the immediate payment of benefits. In Harman, the Ninth Circuit stated that improperly rejected medical opinion evidence should be credited and an immediate award of benefits directed where "(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." Harman at 1178 (citations and quotations omitted). Assuming, arguendo, the Harman holding survives the Supreme

(continued...)

appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see  
generally INS v. Ventura, 537 U.S. at 16 (upon reversal of an  
administrative determination, the proper course is remand for  
additional agency investigation or explanation, except in rare  
circumstances).

### CONCLUSION

For all of the foregoing reasons,<sup>8</sup> Plaintiff's and Defendant's  
motions for summary judgment are denied and this matter is remanded  
for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: February 4, 2013.

\_\_\_\_\_/S/\_\_\_\_\_  
CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE

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<sup>7</sup>(...continued)  
Court's decision in INS v. Ventura, 537 U.S. 12 (2002), the  
Harman holding does not direct reversal of the present case. In  
addition to the outstanding issues that must be resolved, it is  
not clear that the ALJ would be required to find Plaintiff  
disabled for the entire period of claimed disability if the  
medical opinions were fully credited.

<sup>8</sup> The Court has not reached any issue raised by Plaintiff  
except insofar as to determine that reversal with a directive for  
the payment of benefits would not be appropriate at this time.